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IMPLIED AUTHORITY OF A WIFE TO BIND HER HUSBAND.

The case of *Debenham v. Mellor*, in which the Court of Appeal [English] gave judgment on the 24th ult., has attracted so much attention that it might be thought questions of some degree of novelty were raised. Such, however, can hardly be said to have been the case. The present action was brought by the plaintiffs, a firm of linendrapers, against the manager of an hotel, at Brighton, for goods supplied to his wife. It was admitted that the goods were such as would be reasonably necessary or proper for her in her station of life. The defendant pleaded, however, that his wife was forbidden to exceed her allowance, and had no authority to pledge his credit. This was not her first dealing upon credit with the plaintiffs. At the trial Mr. Justice Bowen directed the jury that where a husband and wife are living amicably together, as in this case, the goods supplied being reasonable goods considering her position, *prima facie* she would have authority to pledge her husband's credit; but if in fact it turns out that the husband has withdrawn such authority, then the *prima facie* presumption is rebutted; and further that there was no necessity that the tradesman should know that the wife had been forbidden to pledge her husband's credit, if in fact she had been forbidden to pledge it. The jury found that at the time the goods were ordered the defendant had withdrawn from his wife authority to bind his credit, and forbidden her to do so. Judgment was accordingly entered for the defendant.

The leading case of Jolly v. Rees, [1] was decided in 1864. Before that time, however, the question of the husband's liability for goods ordered by his wife who lived with him had been discussed. Thus in Montague v. Benedict, [2] which was an action in *assumpsit* for goods sold, the plaintiff, a jeweler, in the course of two months, delivered articles of jewelry to the wife of the defendant, amounting in value to £83. It appeared that the defendant was a certificated special pleader, and lived in a ready furnished house, of which the annual rent was £200; that he kept no man servant; that his wife's fortune upon her marriage was less than £4,000; that she had at the time of her marriage jewelry suitable to her condition; and that she had never worn, in her husband's presence, any articles furnished her by the plaintiff. When the plaintiff went to the defendant's house to ask for payment he always inquired for the wife and not for the defendant. The defendant's counsel contended upon those facts that the plaintiff ought to be non-suited, because there was no evidence to show that the husband had any knowledge that the goods had been delivered to his wife, and consequently no evidence of assent to the purchase. Chief Justice Abbott, however, thought there was evidence for the jury, and directed that a husband was not liable for goods supplied to his wife unless he gave her an express or implied authority to purchase. In considering the question of authority the estate and degree of the parties was a fit subject for consideration, and so also was the nature of the articles. The jury found for the plaintiff. A rule *nisi* was obtained for a nonsuit on the ground that there was no evidence to be left to the jury of the husband's assent to the contract, or for a new trial. The rule was made absolute for a nonsuit. The rule of law was thus stated by Mr. Justice Bayley: "If a man without any justifiable cause turns away his wife, he is bound by any contract she makes for necessaries suitable to her degree and estate. If the husband and wife live together, and the husband will not supply her with necessaries or the means of obtaining them, then, although she has her remedy in the Ecclesiastical court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her own support. But whenever the husband and wife are living together, and he provides her with necessaries, the husband is not bound by contracts of the wife, except when there is reasonable evidence to show that the wife made the contract with his assent." The rule was then stated by Mr. Justice Holroyd. The husband is

[1] 15 C. B. N. S. 628.
[2] 3 B. & C. 673.

liable for necessaries provided for his wife where he neglects to provide these necessaries himself. If, however, there is no necessity for the articles provided, the tradesman will not be entitled to recover their value, unless he can show an express or implied assent of the husband to the contract made by the wife. Where a tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his peril; and if it turns out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge. Where a tradesman provides articles for a person whom he knows to be a married woman, it is his duty, if he wishes to make the husband responsible, to inquire if she has her husband's authority or not, for when he chooses to trust her, in the expectation that she will pay, he must take the consequences if she does not. The burden of the proof of the assent of the husband is thus cast on the party who supplied the goods, and who acts upon the supposed authority. Mr. Justice Littledale was also of opinion that the husband is not liable in respect of a contract made by his wife without his assent to it, and that a party seeking to charge him in respect of such a contract is bound either to prove an express assent on his part, or circumstances from which such assent is to be implied.

Seaton v. Benedict,[3] was a subsequent case in which the Court of Common Pleas held that a husband who supplies his wife with necessaries in her degree is not liable for debts contracted by her without having previous authority or subsequent sanction. "A husband," said Chief Justice Best, "is only liable for debts contracted by his wife on the assumption that she acts as his agent. If he omits to furnish her with necessaries he makes her impliedly his agent to purchase them. If he supplies her properly, she is not his agent for the purchase of an article, unless he sees her wear it without disapprobation."

The Court of Exchequer in one case, Johnston v. Sumner,[4] stated that if a man and his wife live together, it matters not what private arrangement they may make; the wife has all usual authorities of a wife—a proposition which conflicts with other decisions.

A similar question was again argued in Jolly v. Rees[5]. In 1851 the defendant forbade his wife to incur debts for clothing for herself and her two daughters. He promised to allow her £50 a year for that purpose, in addition to £65 a year which was settled upon her to her separate use. In 1860 and 1861 the wife contracted a debt with the plaintiffs for clothing. The plaintiffs had no notice of the revocation of the wife's authority. In an action against the husband to recover the price of those goods the jury found that the articles supplied were necessaries suitable to the degree and estate of the parties; that the wife's authority to pledge her husband's credit was revoked in 1851; that if the £115 per annum had been regularly paid to the wife, and applied by her to the clothing of herself and daughters, it would have been sufficient; that beyond the £65 it was not regularly paid, and that so much of it as was paid was insufficient. The arguments in the case were heard by Chief Justice Erle, Mr. Justice Williams, Mr. Justice Willes and Mr. Justice Byles, who dissented from the opinion of the other three learned judges. The majority held that the presumption which exists during cohabitation, and from that circumstance that the husband assents to contracts made by his wife for necessaries suitable to his degree and credit, may be rebutted by showing that he has forbidden his wife to pledge his credit, although no notice of that fact has been communicated to the tradesman. "The question," said Chief Justice Erle, "is whether the wife has authority to make a contract binding on the husband for necessaries suitable to his degree, against his will and contrary to his order, although without notice of such order to the tradesman. Our answer is in the negative. We consider that the wife can not make a contract binding on her husband unless he give her authority as his agent so to do. We lay down this as the general rule, premising that the facts do not raise the question what might have been the rights of the wife, either if she were living separate without any default on her part towards her husband, or if she had been left destitute by

[3] 5 Bing. 28.
[4] 3 H. & N. 261.
[5] *Supra.*

him. Our decision does not militate against the rule that the husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have. Taking the law to be that the power of the wife to charge her husband is in the capacity of agent, it is a solecism in reasoning to say that she derives her authority from his will, and at the same time to say that the relation of wife creates the authority against his will by a *presumptio juris et de jure* from marriage; and if it be expedient that the wife should have greater rights, it is certainly inexpediant that she should have to exercise them by a process tending to disunion at home, and pecuniary distress from without. The husband sustains the liability for all debts; he should therefore have the power to regulate the expenditure for which he is to be responsible by his own discretion, and according to his own means." The ground upon which Mr. Justice Byles dissented from this judgment was that no private arrangement between the husband and wife, uncommunicated to the tradesman, could affect his right to rely on the apparent authority of the wife, or destroy the presumption of the husband's assent to the wife's contracts for necessaries arising from the fact of cohabitation.

In the Court of Appeal, counsel for the appellants in *Debenham v. Mellor*, argued that, according to the principle to be deduced from the authorities prior to Jolly v. Rees, the plaintiffs were entitled to a reasonable notice from the defendant of his withdrawal of the authority given to his wife to pledge his credit. The learned judges who formed the court, namely, Lord Justices Bramwell, Baggallay and Thesiger, were unanimous in dismissing the appeal. The former learned judge having remarked that the question was whether the defendant was to pay for goods which had been supplied by the plaintiffs to his wife without his authority and against his will—the goods being necessary in the sense that they were such as the wife would require—intimated that the courts could not take judicial cognisance of any practice of wives to pledge their husbands' credit for such articles. Lord Justice Thesiger agreed with the decision of the majority in Jolly v. Rees, and thought that the authorities supported it, being to the effect that the wife's authority to pledge her husband's credit depended upon the ordinary principles of agency, and required some evidence of the husband's authority, either express or implied from his acts and conduct. As to the presumption of authority arising from the wife living with her husband, his lordship thought that the notion was founded upon an erroneous view of what was meant by a presumption with reference to the wife's authority, for the presumption only came to this, that the tradesman made out a *prima facie* case against the husband by showing the order given by the wife while they were cohabiting together; but it was a presumption rebuttted by proof that the orders were without his authority. We believe the case will be carried to the House of Lords. If so we shall be curious to see how far their lordships acquiesce in the remarks of Lord Cranworth in Pole v. Leask.[6]

APPELLATE COURTS AND SOME NEEDED REFORMS.—I.

The discussion of the subject indicated by our title is suggested by the present condition of the dockets of the courts of last resort all over this country. One of the leading features of our American State governments has always been cheapness. This, of course, has grown out of the scarcity of money and the practicability of obtaining the services of good men for the offices of trust at comparatively low rates. But as commercial, manufacturing, professional and other employments have become more lucrative, and through the National tendency and the depreciation of the currency, all those employments which are compensated by fees are generally well paid, and in most States even the judges of the courts are fairly paid. But in many of the States the salaries are so greatly disproportioned to the compensation of the merely ministerial officers of the courts, that the clerks and sheriffs generally receive about double the compensation of the judges.

When we take into consideration that the whole community is interested in whatever relates to the right administration of justice, it is marvelous that while we vote millions for railroads and public improvements and for whatever promotes trade and commerce, our appellate courts are denied the necessary appliances for the proper discharge of their functions, simply on account of the niggardly policy of our legislatures which send committees to descend into the bowels of the earth to find some wrong or oppressive conduct on the

[6] 9 Jur. N. S. 829.

part of proprietors (or hunting votes) and forget to see right alongside them a set of men working like slaves to do that poorly which with a little expenditure of money they could perform easily and well. The first needed reform then is to impress our legislators with the necessity of better salaries for our appellate judges, so that the very best talent may always be obtained to fill these positions; and of the more liberal provision by the appropriation of all necessary sums to provide the necessary number of courts with the requisite number of judges, and to furnish the necessary means and appliances to enable them so to perform their duties as to subserve the purposes of the proper administration of justice, without greater labor than is imposed upon persons in other pursuits of like dignity and importance. This reform must mainly be accomplished by the profession. They, only, see the necessity for it in its proper light, and by proper organization and effort on their part it can soon be accomplished,

These preliminary suggestions imply several things, viz.: 1. Our courts of last resort are all over-crowded with cases. 2. Our judges are generally underpaid but over-worked. 3. Much is imposed on them which others might do. 4. By this means the work thus hurriedly done by over-taxed men is often imperfect, the result of which is that the uncertainties of the law are increased by the want of uniformity in the reports. To these may be added two or three propositions which are not foreshadowed but which need reform for the accomplishment of the best results by our appellate courts, and which after a brief reference to those already enumerated, will form the subject of the remainder of this paper. They are: 1. The method of presenting cases by counsel in appellate courts. 2. The method of considering the cases by these courts.

It is not proposed to discuss the method of relieving the over crowded dockets further than to say that it must be done, and that the most practicable course is by intermediate appellate courts with separate judges. For appellate courts composed of the *nisi prius* judges are usually courts for the affirmance of errors. These courts should be conveniently located and have exclusive jurisdiction of all the smaller litigation, and the cases involving larger amounts should either go in the first instance to the court of last resort, or if all the cases go to the intermediate court an appeal should lie to the court of last resort only in the more important cases, determined by the amount and the character of subject matter, so that the crowding of the dockets should not be produced. The right of appeal in some form, however, is quite popular even among the bar, and among the common people it is more sacred than ventillating the mines. So that no system which did not make the right of appeal practically universal would meet popular favor. The limitation of this right under the present Federal judiciary system tends to open that system to popular criticism.

The overwork of the judges, the fact that much might be done by others which is imposed on them, and the effect of these evils, will be considered in connection with the three principal topics now to be considered, viz: 1. The mode of preparing cases for submission. 2. The mode of presenting them to the court by counsel. 3. The mode of considering them by the court.

The first consideration under the first head is as to the condition in which the record shall be required to be when the case goes to the judges. Our position is that whatever is handled by judges of a court of last resort should be printed. If it were necessary that the whole record should be printed, it might be a burden too great upon suitors if the expenses were charged to them; or too great a public expenditure if it were to be met by the government, as it is in cases in the Supreme Court where all except a small sum in each case is defrayed by the Federal government. But no such expenditure is necessary. All that is required is an abstract, or printed case, containing such portions of the record as are involved in the assignment of errors. We are aware that there is criticism upon this view, and yet we are confident that the position is well taken. Let us take an illustration: Suppose the error relied upon to be the ruling of the lower court upon a question of law arising upon the pleadings. Then, however voluminous the record may be, all that is necessary in the paper case is the substance or a copy of the body of the pleading or pleadings involved, with an historical statement of the proceedings through which the final judgment is reached. Suppose, again, the error assigned is upon the rulings at the trial. Then the paper case should contain so much of the bill of exceptions as is necessary to present the question to the appellate court, as it was presented to the court below. But suppose the sufficiency of the evidence to sustain the verdict be assigned, then how can an abstract or printed case meet the demand? This is the inquiry of the objector. We answer: First. Where there is an intermediate court the question of the sufficiency of the evidence ought never to go to the court of last resort, as we believe the rule is in the Court of Appeals of New York, in cases appealed from the general term of the Supreme Court. Secondly. If the insufficiency of the evidence is assignable as error, the substance of any amount of bulk in the stenographic reporter's copy can be condensed into a smaller compass when reduced to print. And if this expense has a tendency to discourage the frequency of this class of appeals, which are in practice generally very fruitless, no great inconvenience will result. The appellant or plaintiff in error, under such a practice should be required to prepare and file copies, equal to the number of judges, of what we will call a printed case, prepared as already stated, and deliver a copy to adverse counsel. If no objection is made, this printed case is the one upon which the appeal or writ of error is argued and determined. If, however, the adverse counsel shall within a given time dissent from the paper case filed and served, he should be required within such time as shall be fixed to file a like number of copies of his printed

counter case or amendment to the printed case on file, in which case these printed cases should go to an officer whose other duties will be considered hereafter, but who should perform the office of master here, and examine the record and make a true statement of the contents of the same in writing and have the same printed as part of the costs of the case, under the order of the court, and file the same with the other printed case on file, and upon these the case should go to a hearing, and no judge should be required to inspect the stiff, unwieldy, crumpled records usually found in boxes of appellate courts, unless he elect to do so. Such drudgery should never be imposed upon the judges.

In addition to the preparation of the cause by having a printed case, each appellate court should have an officer who should perform the duties of master in settling disputed points in the making up of the paper case as has already been suggested, and while his settlement of such controversies should be taken as *prima facie* correct, the parties should not be concluded thereby, but should be permitted upon oral argument to vindicate their theory of the case by reference in the portions of the record in controversy, which being noted should be examined and passed upon by the court in the consultation room. This officer should also be a short-hand amanuensis, with the requisite assistance, so that he could lessen the labor of the judges in preliminary and formal parts of their opinions.

NATIONAL BANKS — EMBEZZLEMENT BY CASHIER NOT PUNISHABLE BY STATE.

COMMONWEALTH v. KETNER.

Supreme Court of Pennsylvania, January, 1880.

Embezzlement by a bank cashier is not an offense at common law. Therefore the punishment provided by a State law for embezzlement by any "officer, director or member of any bank," can not be imposed upon a National bank cashier, his crime being punishable only under the United States statutes.

Habeas corpus. The petition of Wm. Torrey to the Supreme Court set forth that he was unjustly detained in the Schuylkill county jail, to await trial upon a bill of indictment charging him, as cashier of the First National Bank of Ashland, with embezzling the moneys of said bank. The petitioner suggested that the court in which the indictment had been found was without jurisdiction in the matter; that he was therefore unlawfully detained in the custody of the defendant, warden of said jail, and he prayed for a writ of *habeas corpus*, etc.

From the record it appeared that the petitioner had been arrested by State process; and had been indicted, the indictment consisting of three counts, each of which charged the petitioner with having, as cashier of the National Bank of Ashland, incorporated under the laws of the United States, embezzled and misapplied funds of the bank, contrary to the form of acts of assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania. It appeared, further, that the grand jury had found a true bill against the prisoner, who, on arraignment, pleaded not guilty; that the case having been called for trial the jury disagreed and were discharged, and the court directed the prisoner to renew his recognizance. Whereupon he was surrendered by his bail and rearrested.

PAXSON, J., delivered the opinion of the court:

It appears by the return to this writ that the relator is held to answer an indictment in the Court of Quarter Sessions of Schuylkill county, charging him, as cashier of the First National Bank of Ashland, with having embezzled the funds and property of said bank. There are three counts in the indictment, each varying the form of the charge, but not essentially changing its substance.

It is almost needless to say that a *habeas corpus* is not a writ of error. Hence, if the court below had jurisdiction of the offense we can not correct its rulings in this proceeding, however erroneous they may be. On the other hand, it is equally clear that if the relator is being prosecuted for a matter which is not an indictable offense by the law of Pennsylvania, or is one over which the court below has no jurisdiction, it would be our right as well as our plain duty to discharge him. No authority is needed for so obvious a propositfon.

Embezzlement by the cashier of a bank is not a common law offense. This indictment must rest upon some statute of this State, or it can not be sustained. Has it such support? As preliminary to this question it is proper to say that sec. 5209 of the United States statutes provides specifically for the punishment of cashiers and other officers of National banks who shall be guilty of embezzling the moneys, funds or credits of such institutions. The relator was not indicted under this section, and could not have been in a State court. Our own legislation upon this subject may be briefly stated. We have, first, the Crimes Act of 1860 (P. L. 411), the 116th section of which prescribes and punishes the offense of embezzlement by any person "being an officer, director or member of any bank or other body corporate, or public company." Then we have the act of May 1, 1861 (P. L. 515), entitled: "A supplement to an act to establish a system of free banking in Pennsylvania, and to secure the public against loss from insolvent banks, approved March 31, 1860," which also prescribes and punishes embezzlement by bank officers. Lastly, there is the act of June 12, 1878 (P. L. 196), which amends the aforesaid 116th section of the act of 1860, by substituting a new section in its place, and imposing a different punishment. This leaves the acts of 1861 and 1878 as the only ones which could possibly support the indictment. It was urged, however, and with much force, that the act of 1861 was only in-

tended to apply to banks organized under the free banking law, of which it forms a part, and that as to the act of 1878, the offense charged in the indictment was committed prior to its passage. This fact was formally conceded upon the argument, and while we might not be able for such reasons to grant relief upon *habeas corpus*, it furnishes a conclusive reason why upon a trial in the court below the Commonwealth could derive no aid from the act of 1878.

We are spared further comment upon these acts for the reason that they have no application to National banks. Neither of them refers to National banks in terms, and we must presume that when the legislature used the words "any bank," it referred to banks created under and by virtue of the laws of Pennsylvania. The National banks are the creatures of another sovereignty. They were created and are now regulated by acts of Congress. When our acts of 1860 and 1861 were passed there were no National banks, nor even a law to authorize their creation. When the act of 1878 was passed Congress had already defined and punished the offense of embezzlement by the officers of such banks. There was, therefore, no reason why the State, even if it had the power, should legislate upon the subject. Such legislation could only produce uncertainty and confusion, as well as a conflict of jurisdiction. In addition there would be the possible danger of subjecting an offender to double punishment, an enormity which no court could permit if it had the power to prevent it.

An act of Assembly, prescribing the manner in which the business of *all* banks shall be conducted, or limiting the number of the directors thereof, could not by implication be extended to National banks for the reason that the affairs of such banks are exclusively under the control of Congress. Much less can we by mere implication extend penal statutes like those of 1861 and 1878 to such institutions.

The offense for which the relator is held is not indictable either at common law or under the statutes of Pennsylvania. We therefore order him to be discharged.

SATISFACTION OF JUDGMENT—ACCOMMODATION INDORSERS.

KIRTLAND v. MISSISSIPPI, ETC. R. CO.

Supreme Court of Tennessee, April Term, 1880.

The payment by accommodation indorsers of a judgment at law against them in depreciated bank notes furnished by their principal, will be a satisfaction of a subsequent decree in equity against the principal for the same debt; and where the suit in equity was pending in the Supreme Court at the time of the payment, the defense may be made by cross-bill filed before or after the final decree of the Supreme Court.

COOPER, J., delivered the opinion of the court:

On the 31st of October, 1860, F. H. Cossitt sold and conveyed to the Mississippi & Tennessee Railroad Co. a tract of land, reserving on the face of the deed a lien for the payment of the purchase-money, evidenced by two notes, one for $5,717.37 and the other for $6,041. The first of these notes was transferred by Cossitt to the Bank of West Tennessee. This note was renewed several times upon the payment of the interest, the last renewal bearing the date May 6, 1862, at four months, with F. M. White and C. F. Vance as accommodation indorsers. The bank transferred this note to the complainant, Isaac B. Kirtland. He brought suit at law against the railroad company and the indorsers, and afterwards on the 17th of April, 1866, filed the original bill in this cause against the same parties to enforce the lien reserved on the face of the deed for the payment of the purchase-money. The plaintiff afterwards dismissed his suit at law as to the railroad company, and his suit in equity as to the indorsers, White and Vance. On the 23d of April, 1868, Kirtland recovered judgment at law against the indorsers for the full amount then due upon the note. On the 10th of March, 1868, a decree was rendered in this suit in favor of Kirtland against the railroad company for the amount due upon the note, but the chancellor held that the recovery was no lien on the land, and that it might be paid in the notes of the Bank of West Tennessee. The complainant appealed to this court, and the latter part of the decree was reversed, and a decree was rendered declaring that the recovery was a lien upon the land, and was not required to be paid in the notes of the Bank of West Tennessee. The land was ordered to be sold in satisfaction of the decree, if the amount was not paid by the company within a given time. Afterwards, at the same term, upon an affidavit of the defendant's counsel, that the judgment at law had been paid, under an order of that court, in the notes of the Bank of West Tennessee, the court ordered the cause to be remanded to the chancery court for the execution of the decree.

During the same term at which the judgment at law had been rendered in favor of Kirtland v. White & Vance, on the 20th of May, 1868, the defendants came into court, tendered and paid into court the amount of the judgment, with the interest which had accrued thereon, in the bills of the Bank of West Tennessee, and moved the court for a rule upon the plaintiff requiring him to accept the same in satisfaction of the judgment. The rule was granted, upon consideration whereof, after argument on both sides, the plaintiff was ordered to accept the sum so tendered in full satisfaction of the judgment, and the clerk was directed forthwith to pay the same to the plaintiff, taking his receipt therefor. The clerk paid the money to the plaintiff, and entered satisfaction of the judgment, on the same day, May 20, 1868. The plaintiff excepted to the order of the court, but took no appeal. The notes of the Bank of West Tennessee were then worth in the market about thirty cents on the dollar.

After this cause was remanded to the chancery court, on the 12th of February 1875, the parties entered into an agreed statement embodying the

foregoing facts. The plaintiff, while agreeing to the facts, added, "but the plaintiff insists that the court can not take cognizance of them, and objects to their being considered or taken notice of in any form, or for any purpose whatever." He further insisted that he was entitled to the immediate execution of the decree of the court, under the *procedendo* awarded as aforesaid. On the 5th of March, 1875, the cause was heard upon the motion of the plaintiff to have the decree executed, and upon the agreed statement of facts, upon consideration whereof, the chancellor was of opinion that the decree had been fully paid and satisfied. The motion was disallowed with costs, and the plaintiff appealed.

The judgment recovered by the plaintiff at law, on the note in controversy, against the accommodation indorsers, was obtained after the rendition of the decree in equity against the Railroad Company, and the subsequent proceedings of the 20th of May, 1868, touching the tender and payment of the notes of the Bank of West Tennessee, were had while the equity cause was in this court by appeal. The object of applying for a remand of the cause to the chancery court after the rendition of the decree in this court, was, doubtless, to test the question whether the payment by the indorser and acceptance by the plaintiff of the notes of the Bank of West Tennessee, in satisfaction of the judgment at law, was not also a satisfaction of the plaintiff's entire demand. No doubt the question might have been tested, immediately after the notes were paid out to the plaintiff, by a cross-bill in this case, bringing the new facts before the court, and enjoining further proceedings under the appeal to this court until the rights of the parties could be determined upon the new matter. Morrison v. Searight, 4 Baxt. 479. But it is equally clear that this new matter, which could not be used directly in the Supreme Court, which had occurred after the appeal, and which, if a defense at all, was a defense to the enforcement of the judgment or decree of the Supreme Court, might be brought forward by an original bill in the nature of a cross-bill, or by leave of the court, by cross-bill proper. Roberts v. Peavey, 9 Foster, 392; Montgomery v. Olwell, 1 Tenn. Ch. 169. This is the settled rule in the case of the defense of a discharge in bankruptcy pending an appeal in this court. Dick v. Powell, 2 Swan, 632; Anderson v. Reaves, 1 Tenn. Leg. Rep. 129; Eberhardt v. Wood, 2 Tenn. Ch. 490; Wolf v. Stix, 96 U. S. 543. In such a case, where the party is only resisting a demand which he has been constantly opposing, the remedy is open whenever the demand is sought to be enforced. Lewis v. Brooks, 6 Yerg. 167.

The voluntary act of the plaintiff in joining the defendant in making an agreed statement of facts for the consideration of the court, upon the point of controversy between them, can not be considered otherwise than as a waiver of formal pleadings, and a consent to have the matter determined upon its merits. The formal protest of the plaintiff, embodied in the statement, can not mean that the rights of the parties in the matter shall not be determined at all, for that would be inconsistent with the act of joining in the agreed statement. What the plaintiff intended thereby was to claim that, no matter whether the proceedings were formal or informal, his rights acquired by the decree could not be prejudiced by the facts agreed to. In other words, what is said is equivalent to a demurrer to a bill or cross-bill by the defendant, setting out the facts as embodied in the agreed statement, and praying that the decree be declared satisfied. Undoubtedly, the plaintiff is entitled to have his rights declared as upon a formal bill and demurrer thereto. He is not to be prejudiced by the form in which the matter of controversy is presented.

In this view the question is whether, upon a formal bill, the defendant is entitled to have the decree in this cause declared satisfied because of the satisfaction of the judgment at law against its accommodation indorsers by the payment to the plaintiff of the notes of the Bank of West Tennessee. If the judgment had been paid in full by money at par, it is clear that debt would be extinguished. For, however many parties the creditor may have bound for his debt, and however many separate judgments he may recover against them, he is only entitled to one satisfaction. It has been expressly held by this court that the payment by the indorser of a note of a judgment against him on the indorsement will, by operation of law, satisfy a judgment of the same creditor against the maker of the note. Topp v. Branch Bank of Alabama, 2 Swan, 184. It has also been held that the collection of one of several judgments against *tort feasors* for the same wrong will satisfy the other judgments. Knott v. Cunningham, 2 Sneed, 204. No doubt, an indorser is ordinarily entitled to the evidence of debt which he pays; and, if that be merged in a judgment, to the judgment. Eno v. Crooke, 10 N. Y. 66. And the error in the case of Topp v. Branch Bank of Alabama, if there be error, was in overlooking the indorsers right of subrogation by operation of law, and considering it as resting solely on the subsequent formal assignment of the judgment treated as satisfied by the indorser's payment. In this case no such question arises. For the agreed statement of facts shows that the notes of the Bank of West Tennessee, which were used by the indorsers in paying the judgment against them, were furnished by the present defendant. If, therefore, the satisfaction of that judgment satisfied also the decree in this case, the satisfaction was with the money of the defendant, and the indorsers have no claim to subrogation.

The judgment creditor, all the authorities agree, may accept payment in any manner or in any kind of currency; and having once accepted currency, note, check or any other article of value as a substitute for a legal tender, can not revoke his acceptance and enforce payment in money. Freeman on Judgments, § 463. A payment in confederate notes is good if received. Cross v. Sells, 1 Heisk. 83. So is a payment in genuine bank notes, although the bank had in fact previously failed, of which the parties were ignorant. Scruggs v.

Gass, 8 Yerg. 175; Ware v. Street, 2 Head, 609. A payment in depreciated bank paper, if taken as money absolutely, without condition and with a full knowledge of the facts, is undoubtedly good. Such paper would be money, as defined by this court, although under par; and if voluntarily received in satisfaction would extinguish the debt. Crutchfield v. Robbins, 5 Hum. 25; Barford v. Memphis Bulletin Co., 9 Heisk. 694.

This conclusion does not depend upon the *res adjudicata* of the proceedings at law upon the tender of the bank notes. If those proceedings were valid they were of course conclusive, never having been reversed. If void, their invalidity made the receipt of money in satisfaction the voluntarily act of the creditor. In either view, the payment extinguished the debt, and all judgments or decrees based thereon.

The decree of the chancellor must be affirmed.

MASTER AND SERVANT — NEGLIGENCE — WHO ARE "FELLOW SERVANTS."

CHICAGO, ETC. R. CO. v. MORANDA.

Supreme Court of Illinois (Ottawa), January, 1880.

1. When one servant is injured by the negligence or want of care of a fellow-servant while both are engaged in the same line of business, each participating in the same work, the common master will not be liable for the injury. But when they are performing separate and distinct duties having no connection with each other, so that neither one can control or influence the other, and one is injured by the negligence of the other while in the discharge of his duty, the master will be liable to the injured servant the same as to a stranger. Chicago, etc. R. Co. v. Murphy, 53 Ill. 336, disapproved.

2. A track repairer and a fireman on a passing engine, in the employ of the same master, are not "fellow-servants" so as to release the master from liability for injuries sustained by one through the negligence of the other.

3. In an action by the personal representative to recover damages for the benefit of the next kin, the poverty or wealth of the latter is irrelevant.

Appeal from Lee County.

DICKEY J., delivered the opinion of the court:

John Moranda was the foreman of a party of track repairers, whose duty it was to repair and keep in order a section of the railroad track of appellant, and to be upon the track and see that it was kept in order for the running of trains. The hypothesis on which it is sought to sustain the recovery in the circuit court in this case is, that while Moranda was so engaged in this duty, an express train passed by at the rate of some thirty to thirty-five miles an hour; that on the approach of the train to the place where Moranda and his party were at work on the track, they stepped aside to avoid the passing train, he standing some five or six feet from the nearest rail of the track; and that as the train passed a large lump of coal was carelessly cast by the fireman from the tender attached to the locomotive, which struck Moranda and caused his death. This is an action under the statute by the administratrix of the estate of deceased. Appellant pleaded not guilty. A trial by jury resulted in a verdict of guilty, and an assessment of plaintiff's damages at the sum of $4,000, and after overruling a motion for a new trial, the court rendered judgment upon the verdict. On the trial, the plaintiff, who is the widow of deceased, was permitted to prove that after the time of the death of Moranda she and her children had no other means of support, save that arising from his daily earnings. The utmost that can lawfully be recovered in actions of this kind is compensation for pecuniary loss suffered by the widow and next of kin. It was entirely proper to show the amount of his usual earnings, and that plaintiff was his wife in life, and that they had minor children, whom he was by law bound to support, and who usually shared his income; but it was wholly immaterial whether such next of kin had or had not other pecuniary resources after his death. Such evidence was held incompetent in O'Brennan's Case, 65 Ill. 160, and in Powers' Case, 74 Ill. 343. Where the next of kin consist of collaterals, or persons whom the deceased in life was not bound by law to support, unless in a state of dependence, it may be proper to show that in his life they were supported by him. The question is, in such case, what pecuniary loss has been suffered by the next of kin? Their poverty after the death can shed no light on this question. If, immediately after this disaster, the plaintiff and her children had, by inheritance from other sources, become at once wealthy, it would not have abated one cent from the amount of their lawful demand in this case, (if entitled to recover at all,) nor can their poverty be permitted to add thereto. For this error the judgment in this case must be reversed, and the cause remanded for a new trial.

There is, however, another question raised by counsel for appellant which will necessarily arise upon another trial, and ought, therefore, to be decided now. It is insisted that "the plaintiff's intestate, and the person running the locomotive, bore such relation to each other, in the service of appellant, that one could not recover of the common employer damages caused by the negligence or carelessness of the other." We think this position is not tenable.

In Chicago &c. R. Co. v. Swett, 45 Ill. 197, a case in which the fireman was killed by reason of the negligence of the track repairer, it was held that the doctrine in relation to fellow servants did not forbid the action. In Chicago &c. R. Co. v. Gregory, 58 Ill. 272, the right of action was sustained where a fireman on a passing train was killed by a "mail-catcher" improvidently placed too near the track by other servants of the railroad. In that case it was said that, "the agents charged with the duty of properly locating the 'mail-catchers' had no possible connection with the running of the trains, in which service the fireman was engaged;" and it was added that, "the duties were as different and as distinct as those of a conductor and of a track repairer."

In O'Connor v. Toledo &c. R. Co., 77 Ill. 391,

the plaintiff's intestate was, as in this case, a track repairer, and the injury was caused by the negligence of another servant of appellant engaged at the time in running a train upon the track. There the fault was that of another servant of the company, the engineer on the passing train. Here the alleged fault was that of the fireman. It is not perceived how this case differs from that in principle. It was there held that the track repairer and the engineer of a passsng train were not fellow servants, engaged in a common service, so as to exempt the employer from liability for the injury of the one by the neglect of the other. Unless we are to overrule these and other decisions of this court, we can not sustain the appellant in the proposition that this action is barred by the relation of these servants as fellow servants.

Counsel for appellant presses upon our attention what was said by this court in the case of Chicago &c. R. Co. v. Murphy, 53 Ill. 336. In that case the servant injured was one of a party of laborers at a station, whose ordinary duties were to examine arriving trains and take out for repairs any cars in the train needing the same. The injury was caused by the negligence of the engineer operating the switch engine, used at that station for that purpose. This court, upon the facts of that case, held that the servant injured and the offending engineer "were strictly fellow servants of a common master, * * * * engaged in the same general department, to-wit, the doing of the needed work upon the depot grounds for the purpose of dispatching the various trains," And it was there said: "Under these circumstances we are wholly unable to hold * * * that the deceased and the engineer were not fellow servants in such a sense as to snbject them to the well established rule exempting the common master from liability in cases of this character." After having thus pronounced the judgment of the court upon the question arising upon the facts of the case, the learned justice who delivered the opinion of the court proceeds to comment upon an instruction which the circuit court had refused to give to the jury, and says in that connection: "When the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another they must be * * * * regarded as fellow servants within the meaning of the rule." Counsel for appellant, seizing upon this statement, insists that the judgment in the case at bar must be reversed on that ground, or the rule indicated in the case in 53 Ill. must be expressly overruled.

The decision of that case was undoubtedly correct, and does not in any degree militate against the views we have of this case; but the language of the opinion used in commenting upon the instruction in question in that case was plainly too broad, and can not be sustained without overruling the decisions of this court in very many cases. In fact, in that very opinion it is said: "It is of course not easy to define who are to be considered fellow servants with such accuracy that doubtful cases will not occur." As applied to the facts of that case, the instruction in the Murphy case could lead to no false conclusion; but as a definition of what shall constitute fellow servants in this class of cases, the language is plainly faulty. If the law of this State be properly stated in that instruction, then indeed no action will lie for any injury in any case where the servant injured and the servant at fault were, at the time of the injury, each engaged in the ordinary duties of his service, no matter how widely removed may be their employments from each other. It is plain that if the injury did actually occur to one—while in his ordinary employment and from the negligence of the other, while he was in his ordinary employment, the negligent conduct of the latter must necessarily have endangered the safety of the former.

If the law be properly stated in that instruction we ought to overrule the decisions of this court in Shannon's Case, 45 Ill. 709, and in Swett's Case, 45 Ill. 197, and in Welch's Case, 52 Ill. 183, and in Ryan's Case, 60 Ill. 171, and in O'Connor's Case, 77 Ill. 391, and in other like cases. In all these cases, both the plaintiff and the man by whose negligence the injury was caused, at the time of the injury "were in the employment of the defendant, and their ordinary occupations in such service bore such relation to each other that the careless and negligent conduct of the servant at fault endangered the safety of the plaintiff," otherwise he could not have been in such case injured, in fact; and yet in all these cases it was held the action would lie. We are not prepared to overrule these decisions or depart from their teachings, and are, therefore, upon mature consideration compelled to disapprove of what was said in the Murphy case about the instruction discussed in that opinion, although it seems afterwards to have been referred to with approbation in the case of Valtez v. Ohio &c. R. Co. 85 Ill. 500, 5 Cent. L. J. 426. What we have said is enough to dispose of this case, but the able, earnest and elaborate argument of counsel for the appellant seems to call for some further discussion. Recognizing that his position is not in accord with the decisions of this court in the cases referred to *supra*, wherein the common master has been held liable for damage done to one employee by the negligence of another engaged in the same general enterprise, counsel for appellant presses upon out attention arguments and expressions of opinion found in our own reports of other cases where the master has been held exempt, which may seem incompatible with the rulings in the cases where the master has been held liable; and he supports his position by quotations from cases in the English and American courts, which are certainly directly to the point.

The decisions of the courts in other States and the modern decisions of the English courts, though entitled to great consideration, are not binding authority in this State, and should have force here only in so far as the reasons upon which they rest may be found cogent and sound. And arguments and expressions of opinion found in

our own reports, where they conflict with the decisions of this court, must always yield to the decisions. It is no doubt true that many expressions found in the various opinions on this subject in our own reports, if read without reference to the facts under discussion, seem to be incapable of being reconciled; but it is equally true that a careful examination of the facts of the several cases in our reports, and an examination of the judgments pronounced in these same cases, will show remarkable harmony and uniformity in the decisions. Many of these decisions are not in harmony with the modern decisions in England, nor with the rulings in most of the States in this country, but it is believed they are founded in reason, and are in harmony with each other. Redfield, in his work on the Law of Railways, vol. 1, § 131, says: "It seems now perfectly well settled in England, and mostly in this country, that a servant who is injured by the negligence or misconduct of his fellow-servant can maintain no action against the master for such injury." This is undoubtedly true, but the courts do not all agree as to what is necessary to render employees of the same master "fellow-servants" within the meaning of this rule. The same author lays down what may be called the English doctrine on this question to be, that "all the servants of the same master engaged in carrying forward the common enterprise, although in different departments, widely separated or strictly subordinated to others, are to be regarded as fellow servants, bound by the terms of their employment to run the hazard of any negligence of any "of the number, so far as it operates to their detriment." In other words, where the general object to be accomplished by the service of each is one and the same, the employer the same, the several servants deriving authority and compensation from the same source—all employees and agents, from the highest to the lowest, are regarded by the English rule as fellow servants, no matter how remote from each other they may usually be occupied, or how distinct in character and nature may be their respective duties and employments. It is also true that this is the rule approved by the courts of last resort in most of the States in this country. We speak of this for convenience, as the English rule, but in truth its boundaries, as stated by Redfield, were first defined in substance by Shaw C. J. in the case of Farwell v. Railroad Co. Met. 49, and that case has very generally and not improperly been regarded both in England and America, as the leading case in support of what we call the English rule. In this State this doctrine of exemption of the master has never been carried so far.

In several of the States this rule is subjected to limitations, and is not carried to so great an extent. In this court, and in the courts of last resort in other States, the master has been held liable where the servant injured was in a subornate position, and the offending servant stood to the other as the representative of the master; and in other cases where the servants in question had no connection with each other in their service other than that of having a common master and of being engaged in a common enterprise. The courts which maintain the English rule are not harmonious in their reasons for its support, and the courts wherein the rule is qualified by limitations do not agree in all respects as to the limitations to be placed upon the rule; nor do they agree entirely as to the principles on which the rule is founded or by which the limitations should be controlled.

The exemption of the master from liability in case of an injury of one of his servants by the neglect of another is a rule comparatively new. Our attention has not been called to any mention of such a rule, or any allusion to it made in any reported case or by any law writer, until it was asserted in the case of Priestley v. Fowler, 3 Mees. & W. 1, which arose in the Court of Exchequer in the year 1837. It was there said that no precedent could be found for an action by a servant against his master for damages caused by the neglect of his fellow servant. In the seventh edition of Story on Agency, § 153, it is said that this question "has not until recently become a subject of judicial examination." The history of this doctrine is given in that work in that and in other sections immediately succeeding that, and in the copious notes thereto found in that edition. The rule of exemption of the master in such cases is very generally placed upon the ground of public policy; that is, upon what is thought best for the well-being of society. In the very first case where the question arose (Priestley v. Fowler, *supra*), the decision is placed squarely on that ground. The second case on this subject, of which we have any account, is that of Murray v. South Carolina R. Co. 1 McMullen, 385 decided in February 1841. The case of Priestley v. Fowler, *supra*, evidently was then unknown to that court, for it is there said no precedent upon the subject can be found. The master was there held exempt from liability by a divided court. The judges concurring in the judgment did not rest their judgment upon the same grounds. What seems the ablest argument in favor of the judgment in that case was made by Blanding. He says: "No man shall be liable for another's act except he has commanded it or has agreed to be so liable, or when such liability has been imposed on him by law from principles of policy or for the public security." P. 391. And again: "If this (the public security) will be best promoted by making each person engaged in running the train risk all the injuries he may receive without resort to his employer, then he should be excluded from such resort." In Cooley on Torts, 541, it is said "the rule is one of general public policy;" and again, that "in many employments the public are compelled to rely upon the caution and diligence of servants as the chief protection against accidents which may prove disastrous to life or limb." This is the current of the authorities, and we think the true ground upon which the propriety of the exemption of the master in any such case can be sustained. The history of this doctrine of exemption of the master, as well as the best reason-

ing of the cases, show that what we have spoken of as a rule (exempting the master in certain cases) is, in fact, but an exception or qualification of the ancient general rule of the common law *respondeat superior*, and which, prior to the case of Priesley v. Fowler, *supra*, was laid down without qualification by all courts and common law writers. In Comyn's Digest, title Master and Servant, K, it is said: "A master is liable for every act of his servant done by him in the course of his employment," (referring to 2 T. R. 154, where the rule is there stated in these very words.) In Viner's Abridgement, Master and Servant, B, 9, it is said: "If my servant doth anything prejudicial to another it shall bind me, * * * being about my business." Thus the law was formulated by Holt, C. J., in Tuberville v. Stamp, Comb. 459. In the *syllabus* of McManus v. Crickett, 1 East, 107, the law is formulated in the words: "A master is liable for damage arising to another from the negligence or unskilfulness of his servant acting in his employment."

Blackstone, in his Commentaries, says: "If a servant, by his negligence, does damage to a stranger the master shall be answerable for his neglect." 1 Bl. Com. 431. Paley, in his work on Agency, published in 1811, says: "By the employment of an agent, the employer becomes civilly responsible for his care and diligence to those who make use of him in his business." Paley on Agency, 294. And again, 295: "A master is responsible for the negligence of his servant in the prosecution of his service." And the language of Holt, Ch. J. is quoted, where he says: "Where a trust is put in one person, and another, whose interest is entrusted to him, is damnified by the negligence of such as that person employs in the discharge of that trust, he shall answer for it to the party damnified." 12 Mod. 490. Story, in the first edition of his work on Agency, published in 1839, says: "The master is always liable to third persons for * * * negligences * * * of his servants, in all cases within the scope of his employment." No limitation of this rule was ever any where suggested, until this question arose of the liability of a master to his own servant for injury by the neglect of another. In support of the English rule, it has since been suggested, inasmuch as Blackstone, in his statement of the rule *respondeat superior*, speaks only of "damage to a stranger," that the rule by its terms does not embrace the case of damage to a servant; or, as it is said in one case, "this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity;" and then, assuming that there is a privity of some sort between the injured servant and some one else in relation to the act causing the injury, it is insisted that the case of an injury of one servant by the fault of another, in no wise comes within the meaning of the rule as formulated by Blackstone. In a note in———it is well said this reasoning is "artificial and unsatisfactory." It is hardly to be supposed that Blackstone intended, by the introduction of the word "stranger," to state or lay down a limitation upon the rule *respondeat superior*, as before that formulated in Comyn's Digest; 2d Term Reports; in Viner's Abr.; in 1 East; or as expressed long before in Tuberville v. Stamp, Comb. 459; or to qualify the same in any way whatever. If Blackstone had attached to the word "stranger," as used in that sentence, any special significance, it seems he would have given some explanation as to whom we should in that connection regard as strangers; some commentary on the departure of the language of the fathers in the common law.

It is not to be believed that Paley or Story, who formulated the rule after Blackstone's day, intended to state the rule more broadly than was their understanding of the meaning Blackstone intended to convey by the words used by him. It seems almost certain that, had Paley or Story understood Blackstone as stating the rule of *respondeat superior* in a more limited sense than that of the earlier authorities, neither of them would have used the broad language of the older authorities without some comment on the language of Blackstone, and without assigning some reason for differing from a writer of such great authority. It seems more reasonable to infer, as we do, that Blackstone used the word "strangers" in the broad sense, meaning the same as if he had said "damage to another," instead of "damage to a stranger." Kent so understood it; for when he wrote, in 1827, he said of a master: "He is said to be liable if the injury proceeds from the negligence or want of skill in the servant." We are brought to the conclusion that the general rule of *respondeat superior*, in its application to all cases arising before 1837, was applicable to all third persons falling within the true reason of the rule, and that the doctrine of the exemption of the master in case of an injury of one fellow servant by the fault of another is really an exception to the rule. If this be so, to determine what cases fall within the rule and what cases do not fall within the rule, it seems to be wise to consider carefully the reasons on which the rule itself rests, and then to place such cases, and such cases only, on the list of exceptions, as are not within the reasons on which the rule is founded.

The common law rule, whereby the master is made to answer for damage done to others by the neglect of his servant, is plainly unjust when applied to a case where the master has with due care employed a competent and careful servant, and is himself guilty of no wrong. As a mere matter of strict justice, a man who has himself done no wrong, ought not, as a mere matter of strict justice, to be compelled to answer for the negligence of another. The general rule, however, *respondeat superior*, although unjust, as applied to the master in such cases as already shown, is as old as the common law, and is, no doubt, founded in wisdom. This rule, like many others, rests upon considerations of policy—upon the ground that the well-being of society is best promoted in that way. "In no other way could there be any safety to third persons dealing with principals through agents." Story on Agency, § 452. Cooley says: "The well-being of society is best subserved

thereby." Chief Justice Shaw says the rule, *respondeat superior*, "is adopted from general considerations of policy and security," Farwell v. R. Co., 4 Met. 49; and again, in the same case: "The rule is founded on the expediency of throwing the risk upon those who can best guard against it." If this be so, the liability of the master must turn upon the proper consideration, in each class of cases, of what ruling will, in fact, throw the risk upon those who can best guard against it; of what is demanded to promote, in the highest degree, the well-being of society. The best interests of society demand that all business should at all times be so conducted that the least possible harm shall be caused thereby; that all servants, and especially all servants controlling dangerous instrumentalities, shall constantly use due care.

The position that the well-being of society, in early days, demanded in such cases the rule *respondeat superior*, was sustained upon the view then taken of the usual subordination of servants to the will of the master, and the usual devotion of the servant to the interests of the master. It seems to have been wisely thought that it would induce greater caution in servants to avoid injury to others, if servants knew that the master must answer for such injury, and also that the responsibility of the master in such case would usually incite him to greater vigilance in promoting the desired constant caution in his servants. Where servants are habitually consociated in their daily duties, (as most servants were at an earlier day in England,) they may well be supposed to have an influence over each other, and a power to promote in each other caution, by their counsel, exhortation and example, at least equal to that of the master, and perhaps greater. In such case the well-being of society does not seem to demand that the master should be made to answer in cases where he had done all that he ought to do, and the injury was to one such servant and from the negligence of another. The vigilance of such servants in such case may well be supposed to have a greater stimulant to constant exercise, if each one knows that neither he nor his comrades can have any redress for injury to one by the negligence of the other; but where servants of a common master are not consociated in the discharge of their duties—where their employment does not require co-operation, and does not bring them together, or into such relations that they can exercise an influence upon each other, promotive of proper caution—in such case the reason of the rule holding the master responsible for damage resulting from the negligence of one of his servants seems reasonably to apply with as great force as if a stranger were the party injured. The influence of one servant upon another in the encouragement of caution can not be relied upon in such case, for that can only operate where they are co-operating or are brought together by their duties, or where there is consociation. Then, indeed, in cases where they can not be supposed to have in their power in any way to promote caution in each other, the well-being of society, if it is to have any such security, must depend entirely upon the vigilance of the master in promoting constant caution in each of his servants, and upon the desire of servants to protect the master from liability. Hence, the master must in such case be held responsible for the neglect of his servants. The application of these views, it is believed, will render it entirely practicable to maintain the rule adopted by this court—recognizing a distinction between the case of co-servants, whose duties are entirely distinct from each other and are not such as to imply consociation or co-operation, and the case of co-servants consociated by means of their daily duties, or co-operating in the same department of duty or the same line of employment.

The line of argument briefly stated is this: The ancient common-law rule which holds a master (even in cases where he is guilty of no fault) reponsible for the neglect of his servant, where a third person suffers damages from the negligence of such servant, rests entirely upon considerations of its practical effect upon society, upon considerations of policy, and these considerations of policy rest upon the idea that the subordination of the servant to the will of the master, and his devotion to the interests of the master, give him under that rule incentives to caution he would not otherwise have; and upon the idea that the rule will incite the master to greater vigilance in the selection of prudent servants, and to greater zeal in the exercise of his influence over his servant to secure the exercise of care in all cases, then the reason of the rule ceases. The application of the rule ought also to cease. And especially is this true of a rule which rests not upon its own justice, but solely upon considerations of policy. Where servants of the same master are directly co-operating with each other in a particular business at the time of the injury, or are by their usual duties brought into habitual consociation, it may well be supposed that they have the power of influencing each other to the exercise of constant caution in the master's work (by their example, advice and encouragement, and by reporting delinquencies to the master) in as great and in most cases in a greater degree than the master. If, then, each such servant knows that neither he nor his fellow servant, if injured by the other's negligence, can have redress against the master, he has such incentive to constant care, and such incentive to the exercise of his influence upon his fellow to incite him to constant care, that the well-being of society in such case does not demand that the master be made to answer.

The same considerations of policy which, to avoid injuries to third persons, usually demand that the master be held responsible, seem plainly not to demand it in the case of such co-servants. But though servants are employed by the same master, and are engaged in doing parts of some great work carried on by the master, still, unless either their duties are such that they usually bring about personal association between such servants, or unless they are actually co-operating at the time of the injury in the business in hand or in the same line of employment, they have generally

no power to incite each other to caution by counsel, exhortation or example, or by reporting delinquencies to the master, and the well-being of society in such case must depend upon the devotion of the servants to the interests of the master, and the zeal of the master to promote a constant exercise of due care by his servant; and to bring these instrumentalities into action it becomes necessary (as in the case of an injury to a stranger), to adhere to the general rule that the master must answer for the neglect of his servant, and this, as already suggested, because the facts are such that society can not in such case avail itself of the mutual power and influence of one servant upon another for want of the necessary opportunity for its exercise, and hence must depend for inducements to caution which are supposed to follow the general rule of the master's liability.

An examination of the decisions of this court upon this question will show that the judgments are all in full and strict accord with these views; and it is believed no case can be found in our own reports where the common master has been held exempt from liability for injury to one servant by the neglect of another, where it does not appear that the servants were strictly co-operatives in the particular work they were about, or were usually consociated in their ordinary duties. The first case in this court where this question received consideration was that of Honner v. Illinois Cent. R. Co. 15 Ill. 550. The plaintiff was one of several servants of appellee engaged in adjusting a turn-table when he was injured by the others so engaged with him. It was held he could not recover. Here they were strictly co-operating in the particular work they were about. In Illinois Cent. R. Co. v. Cox, 21 Ill. 23, the servant injured was a laborer on a wood train, and the injury was the result of the negligence and want of vigilance on the part of the engineer and conductor running the train, and it was held no recovery could be had. Here they were consociated in their ordinary duties—they usually worked together. In Chicago &c. R. Co. v. Keefe, 47 Ill. 108, the plaintiff was a laborer on a construction train, and was injured by the neglect of the engineer and conductor operating the train. It was held the action would not lie. Here they usually worked together. In Murphy's Case, *supra*, the injury was to one of a "repair gang," working at a station or yard, and was caused by the negligence of the engineer of a (the) switch engine which was constantly engaged at that yard, and by which cars were switched for repairs. 53 Ill. 336. In Garland's Case the injury was caused by the negligence of servants engaged in moving cars, and was done to one of their number, strictly an associate. 67 Ill. 498. In Britz's Case, 72 Ill. 256, a laborer on a construction train was injured by the negligence of the conductor and brakeman of the same train; and in the Case of Troesch, 68 Ill. 545, a conductor at a yard who directed and assisted in making up trains, claimed to have been injured by the fault of the switch engine driver engaged in making up the same trains, and they were held fellow servants. In Keene's Case, 72 Ill. 512, the servant injured was a brakeman, and the fault was that of the engineer on the same train. In Durkin's Case, 76 Ill. 395, a laborer or shoveler on a gravel train was injured by the neglect of the engineer on the same train. In the Case of Bush, 84 Ill. 571, it was a brakeman who was alleged to be injured by the default of the engineer operating the same train; and in the Case of Valtez, 85 Ill. 500, a car repairer at a station or yard was injured by the negligence of the engine driver of the switch engine used at the same yard.

It is insisted, in substance, that the reasons assigned in support of these decisions are such that they should govern in this case, and others in which this court has held the common employer liable. Thus it was said: "There are certain perils incident to all employments, and which both parties have in view when the engagement is made, * * * * and which the employer does not undertake to insure against." Honner's Case, 15 Ill. 552. But in the same case it was said: "I would be far from saying that there may not be cases of carelessness * * * * on the part of those to whom the corporation may entrust the management of its concerns, producing injury to the employees of the company for which it would be liable." And in Cox's Case, *supra*, it was said: "It is right and proper that one servant should not recover against the common master for the carelessness of his fellow servant," etc.; but the reason assigned was: "It is important to all concerned that each servant should have an interest in seeing that all his co-servants do their duty," and it is plain this reason can only apply in cases where the service of the one bears such relation to the other, that such servants may have it in their power to exercise an influence to that end. And in Garland's Case it was said: "By so entering into this employment" he "took upon himself the natural and ordinary risks and perils incident to the service in which he engaged, among which was the carelessness of his fellow servants." 67 Ill. 500.

The same suggestion that the employee, by his contract of service, undertakes the hazard of the occasional negligence of fellow servants who are generally careful, and that the employer does not warrant against such hazard has been expressed in Durkin's Case, 76 Ill. 397, and in Valtez's Case, 85 Ill. 502, and perhaps in other cases. But it must be remembered that the contract thus spoken of is in no case supposed to be an express contract. It is an implied contract to which reference is made; and it must also be remembered that implied promises are mere fictions of the law whereby one is supposed to undertake to perform the duties imposed upon him by law. In Kerr's Action at Law (3d ed.) by Smith, p. 144, it is said implied contracts arise from this general implication and intendment of courts, that every man hath engaged to perform what his duty and justice requires. Chief Justice Shaw, in discussing the question whether the common master of fellow servants rests under any implied promise to

protect one against the negligence of the other, says: "In considering rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned under given circumstances." When, therefore, it is said in this connection that a servant assumes by entering the service of his master any given hazard, it is merely another form of saying that, under all the circumstances, the law imposes that hazard upon him. Remembering then that in this State it is held that the law does not impose upon the servant the risk as to the neglect of all the servants of his master engaged in the same general enterprise, but confines that risk to cases where he and the offending servant are in a proper sense fellows, it will readily be perceived that these general words are to be understood as applying to the cases in which they are used; applying to cases where this court holds that the law does impose the hazard upon the servant. In other words, the servant by engaging in the service, by an implied promise, takes upon him all risks which the law imposes upon him, and no others, and these are not improperly called "ordinary risks," and embrace the exceptional negligence of careful servants, who are his fellow servants within the law of this State, but do not embrace the acts of negligence of other servants of the same master who are not properly his fellows, although engaged in parts of the same general enterprise of the common master. Accordingly this court has in many cases held the master liable to the servant for damage caused by the neglect of another servant, although both were doing service, contributing to the accomplishment of the same general enterprise.

In Chicago &c. R. Co. v. Shannon, 43 Ill. 339, the injury was to a brakeman from the bursting of a boiler, and the fault was the negligence of the foreman at the round-house in sending out an unsafe engine. The master was held liable. In Chicago &c. R. Co. v. Swett, 45 Ill. 197, the injury was to a fireman upon a locomotive, and was caused by the negligence of the track repairers in not keeping a bridge or culvert in proper repair, and the master was held responsible. In Schooner Norway v. Jensen, 52 Ill. 373, the injury was to a sailor on the schooner, and was caused by the negligence of other servants of the same master whose duty it was to see that the rigging and tackle of the vessel should not be sent out in bad order or in a defective condition. It was held the action would lie. In the case of Illinois Cent. R. Co. v. Welch, Id. 183, the injury was to a brakeman on a passing train, and was caused by the negligence of other servants of the company in placing an awning at the station in dangerous proximity to the operators on passing trains, and the action was sustained. Where the injury was to a brakeman on a freight train, and was caused by the negligence of other servants of the same employer, having charge of the inspection and repairs of cars, in permitting a car to go out on the road with a defective ladder, which defect was unknown to the brakeman, the common master was held liable. Chicago &c. R. Co. v. Jackson, 55 Ill. 492. Where the injury was to a fireman upon a passing train, and was caused by the negligence of servants not connected with the running of the train, in negligently placing a "mail-catcher" too near the track, it was held the action would lie against the common master. Chicago &c. R. Co. v. Gregory, 58 Ill. 272. Where the injury was to a common laborer in a carpenter shop of a railroad company near the railroad track, and the injury was caused by the negligence of the engineer in charge of a passing train of the same company, the common master was held liable. Ryan v. Chicago &c. R. Co., 60 Ill. 171. In the case of Toledo &c. R. Co. v. Conroy, 61 Ill. 162, although the action was defeated on another ground, the court indorse the proposition that when the injury was to a fireman, from defects in a railroad bridge unknown to him, and which ought to have been known to other servants of the same employer, and the injury came through the negligence of the latter, an action will lie; and in this same case it was afterwards so adjudged. 68 Ill. 560.

In Chicago &c. R. Co. v. Taylor, 69 Ill. 461, where the injury was to a station agent and switchman at a way station, and was caused by the negligence of other servants of the company whose duty it was to see that cars on passing trains should not go out upon road without proper lights and proper brakes, the common master was held liable. In Illinois Cent. R. Co. v. Patterson, Id. 650, it is laid down that an action would lie when the injury was to an engineer of a passing train, and was caused by the negligence of other servants of the common master whose duty it was to see that the railroad track was in good order; although that action was defeated by the negligence of the servant who suffered the injury. Where the injury was to a switchman at a station, and resulted from the negligence of the car inspector in permitting a caboose to go out on the road with a draw-bar which was too short, the common master was made to answer to the injured man, Toledo &c. R. Co. v. Frederick, 71 Ill. 294; and where the servant injured was one of a party of track repairers whose ordinary duties were not at the stations, and the injury occurred by reason of the negligence of an extra engineer whose duty was to take arriving engines to the round-house, and while the party injured was temporarily engaged, by the express orders of his foreman, in ditching the track at the station, this court said that the rule which forbids a recovery by a servant for an injury resulting from the negligence of a fellow servant did not apply. Pittsburg, &c. R. Co. v. Powers, 74 Ill. 341. Where a brakeman upon a freight train was injured through the negligence of other servants of the common master whose duty it was to send out no cars save those which were safe so far as could be ascertained,

the common master was held liable. Toledo &c. R. Co. v. Ingraham, 77 Ill. 309. In the case of Toledo &c. R. Co. v. O'Connor, 77 Ill. 391, the servant injured was a laborer employed as a track repairer on a section away from the station, and at the time of the injury was coming from his work, with his associates, over the main track on a hand car, and the injury was caused by the negligence of the engineer upon a passing locomotive, and this court held the common master liable. So, where the injury was to an engineer by the explosion of his engine, it was held that the engineer can not be regarded as a fellow servant with the servants of the same master whose duty was to inspect and keep in order its engines. Toledo &c. R. Co. v. Moore, 77 Ill. 217. So, where the injury was to an engineer operating a train on the railroad, and was caused by the negligence of the train dispatcher whose duty it was to regulate the movement of trains by telegraphic orders or otherwise, it was held that the common master was answerable. Chicago &c. R. Co. v. McLallen, 84 Ill. 109.

It will be seen by the cases cited that in all the cases wherein the right of action has been denied upon the ground that the injured servant and the offending servant were fellow servants, the facts show that they were brought into personal consociation by their ordinary duties, or that at the time of the injury they were actually co-operating in some particular work; and it also appears that, in the cases where the action has been sustained, no such relations existed. In the latter cases this court has said, they were not employed "in the same department of labor," and that the one is "not in the same line of employment" with the other; and again, that "they did not co-operate in the performance of their duties." And in Gregory's Case, *supra*, it is said that "one servant can recover from a common master for the negligence of a fellow servant unless the latter is in the same line of employment." And again: "The agents charged with that duty (of properly locating the mail-catcher) had no possible connection with running the trains. * * * * The duties were as different and as distinct as those of a conductor and those of a track repairer." In another case, by way of showing that the relation of fellow servants proper did not exist, it is said "neither could control the other, know of his want of prudence," and, again, they "are not associated in the performance of their duties;" and in one case (Ryan v. R. Co., 60 Ill. 171) it is said that "the reason for holding against a right of recovery in certain cases of co-servants is that for the safety of all each servant in the same department of business should be interested in securing a faithful and prudent discharge of duty by his fellow servants," and that each should be induced to report to the master any delinquency of those engaged with him in the performance of duty. "This reason," it is said, "can not apply where one servant is employed in a separate and disconnected branch of the business from that of another servant;" and again it is said "the object of the rule of exemption of the master is to make each servant vigilant in seeing that the others are careful and faithful;" and it is added, "where the reason of the rule fails the application of the rule should cease." Although the distinction taken by this court between these two classes of co-servants has not the sanction of the courts of England, nor that of most of the courts of last resort in this country, we think on principle it is a distinction which ought to be taken, and which logically springs from the true reason (as already suggested) on which the common law rule *respondeat superior* rests—upon the expediency of throwing the risk upon those who can best guard against the danger.

Had these considerations been constantly kept in view, in all cases of injury to one of his servants by the fault of another, it is believed the exemption of the master in such cases would have been kept within reasonable bounds. If courts constantly had an eye to casting the hazard on those who have the best means of preventing wrong, it is thought the exemption would have been applied to cases where the co-servants occupy such position in relation to each other as to suggest that they could in some way contribute towards guarding against the danger to be apprehended. This, however, being really a question as to what rule will best subserve the great interests of society, it is perhaps not surprising that courts of different States and different countries should have differed in their judgment as to what rule on this subject should govern.

The fact that no case can be found in the reports of judicial proceedings prior to 1837, in which a master was ever sued by his servant for damage done to him by the neglect of another of his servants, and the fact that the first case of the kind in England was decided against the action, and the fact that the first case of the kind in America (decided evidently before the report of the English case was known to the bar or bench in South Carolina) was also decided against the action, (Murray v. R. Co., 1 McMullen, 385,) are very significant in showing that the action in cases of strictly fellow servants ought not to be sustained. On the other hand it is true that what is here denominated the English rule on this question, has in all its progress in the courts of England and America encountered constant resistance by the bar and many of our ablest jurists, and that the reasons assigned in its support by the courts adopting it, have been deemed inadequate and illogical, and have not been found in harmony with each other. These facts are significant in suggesting that that rule has not generally been placed on its true foundation and has generally been carried too far. Upon the whole we see no sufficient reason to depart from the rule indicated by the decisions in our own State, and can not do so in this case. The judgment in this case must be reversed, and the cause remanded for a new trial in consonance with the views herein expressed.

Reversed and remanded.

SHELDON J., dissents upon the second branch of the opinion.

ABSTRACTS OF RECENT DECISIONS.

UNITED STATES SUPREME COURT.

October Term, 1879.

CONSTITUTIONAL LAW — COMMERCE BETWEEN STATES—WHARFAGE FEES—WHEN ILLEGAL.—1. It must be regarded as settled that no State can, consistently with the National Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory. 2. An ordinance of the city of Baltimore, authorized by a statute of Maryland, and in pursuance of which vessels landing at the public wharves of the city, laden with the products of other States, were required to pay wharfage fees which were not exacted from vessels landing thereat with the products of Maryland, declared to be in conflict with the National Constitution. 3. Wharfage fees, so exacted, can not be regarded, in the sense of former decisions, as compensation for the use of the city's property, but a mere expedient or device to build up the domestic commerce of Maryland by means of unequal and oppressive burdens upon the industry and business of other States. 4. The power of the National government over commerce with foreign nations and among the several States reaches the interior of every State of the Union, so far as it may be necessary to protect the products of other States and countries from discrimination by reason of their foreign origin.—*Guy v. Mayor of Baltimore*. In error to the Baltimore (Md.) City Court. Opinion by Mr. Justice HARLAN. Judgment reversed.

POWER OF CORPORATION TO HOLD LAND IN ANOTHER STATE—PRESUMPTION—POLICY OF STATE - POWER OF HEIRS TO IMPEACH CONVEYANCES. — 1. While, as a general proposition, a corporation must dwell in the State under whose laws it was created, its existence as an artificial person may be acknowledged and recognized in other States. Its residence in one State creates no insuperable objection to its power of contracting in another. 2. It is a principle as inviolable as it is fundamental and conservative, that the right to hold land, and the mode of acquiring title to land, must depend altogether upon the local law of the territorial sovereign. But in harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, including the acquisition of real estate, unless it is prohibited from so doing, either in the direct enactments of the latter State, or by its public policy, to be deduced from the general course of legislation, or from the settled adjudications of its highest court. 3. We can not presume that it is now, or was in 1870, against the public policy of Illinois that one of its citizens should convey real estate there situated to a benevolent or missionary corporation of another State of the Union for the purpose of enabling it to carry out the objects of its creation, since that State permitted its own corporations, organized for like purposes, to take real estate, within its limits, by purchase, gift, devise, or in any other manner. 4. The children and heirs-at-law of a citizen of Illinois who has conveyed to a New York corporation real estate in Illinois can not, in an action to set aside the conveyance upon the ground that it was against the public policy of Illinois, raise the question that the grantee corporation has acquired a larger quantity of real estate than its charter allowed or than its business required. That question does not concern them, if the title has passed by valid conveyance from their ancestor. 5. The case of Carroll v. East St. Louis, 67 Ill., and Starkweather v. Am. Bible Soc., 72 Ill., examined and distinguished from present cases. — *American &c. Christian Union v. Yount*. Appeal from the Circuit Court of the United States for the Southern District of Illinois. Opinion by Mr. Justice HARLAN. Decree reversed.

NATIONAL BANK—GUARANTY OF NOTES BY—AUTHORITY OF VICE-PRESIDENT—ULTRA VIRES.—The vice-president of a National bank, upon making a transfer for value of certain notes belonging to the bank (the bank being the correspondent of the transferee), executed this guaranty: "In accordance with your telegram I herewith hand you ten notes of $5,000 each." "We debit your account $50,000." "This bank hereby guarantees the payment of the principal sum and interest of said notes." This was done in behalf of the bank and the notes were also indorsed by the same individual as vice-president of the bank. It was done with the knowledge and consent of the president and cashier of the bank, but without authority of the directors, as a board, or the majority of its members individually: *Held*, that the bank was liable on the guaranty. The National Banking Act (Rev. Stat. U. S. 909 § 5136) gives to every bank created under it the right "to exercise by its board of directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, *by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt*, by receiving deposits," etc. Nothing in the act explains or qualifies the terms italicised. To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse, "waiving demand and notice," and would be bound accordingly. A guarentee is a less onerous and stringent contract than that created by such an indorsement. It was competent for the bank to give the guaranty in question. It is to be presumed the vice-president had rightfully the power he assumed to exercise, and the bank is estopped to deny it. Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences. The doctrine of *ultra vires* has no application in cases like this. Merchants' Bank v. State Bank, 10 Wall. 645. All the parties engaged in the transaction and the privies were agents of the bank. If there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards. These facts conclude the bank from resisting the demand of the other party. Wharton on Agency, § 89; Bigelow on Estoppel, 423; Railroad Co. v. Howard, 7 Wall. 392; Kelsey v. Nat. Bank of Crawford Co., 69 Pa. St. 426; Steamboat Co. v. Mc Crutcheon, 13 Id. 15. A different result would be a reproach to our jurisprudence. — *Peoples Bank of Belleville v. Manufacturers Bank of Chicago*. In error to the Circuit Court of the United States for the Northern District of Illinois. Opinion by Mr. Justice SWAYNE. Judgment reversed. 21 Alb. L. J. 276.

SUPREME COURT OF FLORIDA.

January Term, 1880.

JURISDICTION OF EQUITY TO ENJOIN SHERIFF—APPRAISEMENT AND SELECTION OF PROPERTY.—1. A court of equity has no jurisdiction of a bill filed to enjoin parties and sheriff from proceeding to appraise and claim the exemption of personal property, levied upon by *fi. fa.*, even though it be alleged that the judgment and execution are for the purchase money of the property. 2. The appraisement and selection of personal property claimed to be exempt from levy and sale, do not determine whether the property is lawfully exempt. That question is for a court of law to determine. Decree affirmed. Opinion by RANDALL, C. J.—*Christopher v. Bowden.*

CRIMINAL LAW—INITIAL LETTER IN NAME—ORDER OF EVIDENCE—PRACTICE—CHARGE.—1. An initial letter, interposed between the Christian and surname, is no part of the name. The law knows only of one christian name. 2. An indictment was presented by a grand jury against Robert H. Burroughs. The defendant pleaded in abatement that his name was Robert Burroughs. The court permitted the State's Attorney to specify in writing the fact that the indictment was found against Robert Burroughs under the name of Robert H. Burroughs, such specification in writing being under ch. 1107 of the laws of 1861: *Held*, that the court had authority so to order, under and by virtue of the act. 3. Courts are intrusted with a discretion in regard to the order of the introduction of evidence and the examination of witnesses, and this discretion should be exercised in furtherance of justice. 4. It is not error when in the exercise of a sound discretion the court permits the party to introduce a new witness after the evidence is closed on both sides, unless such witness has been kept back by trick, or the opposite party has been deceived or injuriously affected by it. 5. During the trial the counsel for the defendant reduced to writing and gave to the judge a proposition he desired him to embody in his charge to the jury. Subsequently, in charging the jury, the judge neglected to give such proposition, or the substance thereof, to the jury. Defendant's counsel did not call the attention of the judge to such request, and failed to note an exception. *Held*, that defendant's counsel abandoned his request, and that there was no error. Affirmed. Opinion by VAN VALKENBURG, J.—*Burroughs v. State.*

SUPREME COURT OF MISSISSIPPI.

March-April, 1880.

EVIDENCE — RIGHT TO EXHUMATION OF DEAD BODY IN CIVIL SUIT.—Suit on a life insurance policy taken out by plaintiff's husband in his lifetime for his benefit. The company defended on the ground that the husband in his application for the insurance stated that he had never received any serious personal injury; whereas, in fact, he had, in his boyhood, received a wound on the head, by which his skull had been fractured and been healed by the operation of trephining. On the trial the company asked the court for an order to have the body of the deceased exhumed with a view of ascertaining whether in fact such fracture had been sustained, there being no witnesses obtainable who were able to testify to the fact. The motion was denied. *Held*, no error. That in a proper case the court in the interest of justice might compel the exhuming and examination of a dead body which is under the control of the plaintiff, if there be strong reason to believe that without such examination a fraud is likely to be accomplished, and defendants have exhausted every other method known to the law of exposing it, *semble*. The defendants offered to prove by a witness that the deceased in his lifetime had said that his skull had been fractured in childhood, but this testimony was, upon objection, excluded. *Held*, correct. The weight of authority is that no statements of the insured made after the issuance of the policy are receivable in evidence to contradict the written statements contained in his application, where the policy is issued for the benefit of another. Opinion by CHALMERS, J.—*Grangers Life Ins. Co. v. Brown.*

CITY WARRANTS — LIABILITY OF CITY — NEGLIGENCE OF OFFICERS.—Suit on city warrants which had been fraudulently raised and then transferred to C, a *bona fide* holder for value. The alteration was so skilfully made as to baffle detection, but this was rendered possible by the fact that the town authorities in issuing the warrants failed to draw pen marks through so much of blank spaces in the printed forms as was not used in writing the true amounts. It is insisted that these facts made the corporation liable for the full sum as now expressed upon the face of the warrants, because it was by the negligence of its officers that the fraud upon C was possible. *Held*, that C could not recover for two reasons. (1) The warrants or checks in question drawn by the city upon its own treasury through transferrable under our statute, possess none of the elements of commercial paper, and are not governed by the principles which apply to similar instruments drawn by private parties. They are intended only to serve as certificates of the amount due to the parties in whose favor they are issued, and to furnish a convenient method of adjusting and paying the municipal indebtedness. In so far as they are authorized by law and no farther they impose a liability upon the municipality. Whenever issued in excess of authority they are null and void. 2. It is not possible for the officers of a municipal corporation to impose any liability upon the constituent body by their crimes or torts, even when committed *colore officii*, unless expressly authorized or subsequently ratified, or done in the pursuance of some general authority over the subject matter of their action. They may by such acts make themselves personally liable, but they impose no obligation upon the public. Judgment affirmed. Opinion by CHALMERS, J.—*Chandler v. Bay St. Louis.*

ACKNOWLEDGMENT OF MORTGAGE BY WIFE—CERTIFICATE NEED NOT BE MADE IN HER PRESENCE.—H and wife executed a mortgage upon the wife's realty. The instrument was properly executed and acknowledged, save that the officer taking the acknowledgment failed at the time to sign the certificate that the wife had acknowledged it, though the certificate was written out and appended. It was recorded, and ten months afterwards the officer discovering his omission informed Mrs. H of the fact, and upon her then admission that she had appeared before him and acknowledged it ten months previously, appended an additional certificate to that effect. No rights of third parties had intervened. Bill is filed, the debt not having been paid, to subject the property to its payment. *Held*, that the certificate is not required by the statute to be made or signed in the presence of the woman. If an hour or a day elapses after she acknowledges it and before the officer signs the certificate, it does not avoid the instrument. The judicial act has been performed when she has made and the officer has received her separate acknowledgment.

Decree reversed. Opinion by CHALMERS, J.—*Harman v. Magee.*

SUPREME COURT OF ILLINOIS.

February-March, 1880.

DIVORCE—IMPOTENCY—BURDEN OF PROOF—DELAY.—1. In a suit for divorce on the ground of impotency, the burden of proof is on the plaintiff both to prove the impotence and that it is incurable. 2. Under the statute the court is not bound to take the testimony of a party as true. The statute requires that the cause for divorce be fully proven by reliable witnesses, and while this does not authorize the court capriciously and arbitrarily to disregard evidence, or refuse to act when the proof is reasonably clear, still it vests the court with a considerable degree of discretion in regard to the proofs. 3. A long delay may be considered as showing that the charge is a fabrication. "The appellant's story, as detailed in her evidence, has some marks of improbability about it. And the fact that she has waited for ten years before bringing the suit is strongly against her, not as showing a condonement (if such a term could be applicable here), but as a circumstance tending to show that her story is a fabrication. Under the law, as administered in the English courts, a less delay than that here, where the husband has been an applicant for divorce on the ground of the impotency of the wife, has been held a bar to his right to a decree. 2 Bishop on Marriage and Divorce, (5th ed.) § 582. And so we held in Piepbo v. Piepbo, 88 Ill. 438." The decree of the court below dismissing the plaintiff's bill is affirmed. Opinion PER CURIAM.—*Lorenz v. Lorenz.*

MUNICIPAL CORPORATIONS—ESTOPPEL.—The doctrine of estoppel *in pais* is applicable to municipal corporations as well as to private corporations and citizens. 64 Ill. 447; 79 Ill. 39: 81 Ill. 156. A city can not be allowed to recover a penalty from a person pursuing a trade or calling, for the privilege of which the city has received and retains the consideration exacted of him. In such case it is immaterial whether the ordinance under which the privilege was granted was valid or invalid, or whether the agents acting on behalf of the city were *de facto* or *de jure* officers or no officers at all. Therefore, when a person takes out a license to keep a dram shop within a city, pursuant to an ordinance of the city issued by *de facto* officers of the corporation, and pays into the city treasury the sum exacted therefor, and gives the proper bonds, before the city can maintain an action against him for the penalty for carrying on business without a license, it must revoke his license and return him his money. Reversed. Opinion by SCOTT, J.—*Martell v. East St. Louis.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

April, 1880.

GAME LAWS—POSSESSION OF BIRDS KILLED IN ANOTHER STATE.—The statute of 1879, ch. 209, sec. 1, providing that "whoever in this Commonwealth takes or kills any woodcock or ruffed grouse * * * * or sells, or has in possession, or offers for sale, any of said birds, shall, upon conviction," etc., will not authorize a conviction for having in possession birds named therein which have been lawfully taken or killed in another State. See Com. v. Williams, 6 Gray, 1, 6; Phelps v. Raey, 60 N. Y. 10; Railroad Co. v. Husen, 95 U. S. 465. Opinion by GRAY, C. J.—*Com. v. Hall.*

DEED—COVENANT TO DISCHARGE MORTGAGE—BREACH.—A deed recited that R, grantor, "in consideration of, etc., paid to W, by P," did "remise, release and forever quitclaim to said P a certain parcel of land;" that "said premises are subject to a proportionate part of a mortgage, of $3,000, from which W (by whom the consideration of this deed is received, said R only holding the record title) agrees to release said granted premises." The final clause stated that W, who signed and sealed the deed, "joins to release any equitable interest in said premises." *Held*, that W had expressly covenanted to procure a discharge of the mortgage, and, upon foreclosure, was liable for breach of said covenant, and that the final clause, not stating the release of any equitable interest to be the only purpose of signing, could not impair the previous covenant. Bartlett v. Bartlett, 4 Allen, 446; Perkins v. Richardson, 11 Allen, 538. Opinion by Gray, C. J.—*Palmer v. Wall.*

SUPREME COURT OF MISSOURI.

March, 1880.

TESTIMONY OF WITNESS ON FORMER TRIAL SINCE DECEASED—WHEN ADMISSIBLE.—Action under the statute for claim and delivery of personal property by B, her husband being joined as nominal plaintiff, to recover possession of a horse. The case was tried before a justice of the peace, and on the trial B testified and judgment was rendered in her favor, and defendant appealed to the circuit court. Subsequently B died, and the cause was revvived in the name of S, her administrator. At the trial in the circuit court S, after proving by the justice that B was sworn as a witness and testified on the trial before him, and that defendant was there present in person and by attorney, offered to prove what the testimony of B was at said trial as to the ownership of the horse, which was rejected by the court: *Held*, error, for the reason that defendant was present at the former trial and had opportunity to cross-examine the witness. 1 Greenlf. Ev. 163; 37 Mo. 91, 50 Mo. 126, 45 Mo. 265. The statute prohibiting a party from being a witness when the other party to the action is dead, has no application to the present case. Reversed. Opinion by HOUGH, J.—*Shaw v. Feurt.*

QUERIES AND ANSWERS.

[**** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

28. Where several attachments are issued from a State court against the same defendants, and levied on a stock of goods, and the senior attaching plaintiff removes his case into the United States Circuit Court under the act of March 3d, 1875, what becomes of the goods? Will the United States Circuit Court order the marshal to take and hold the goods subject to the orders to be made in such case, and do the junior attaching plaintiffs lose their lien on such goods; or, if not, how can they enforce their judgments? A. M. C.

CURRENT TOPICS.

It seems to be now well settled that words of inheritance are not necessary to pass a fee by will, if the intent to pass it is otherwise evinced. In *Waterman v. Green*, lately decided by the Supreme Court of Rhode Island, a devise was as follows: "I give and devise to my nephew, H. W. G., my undivided half of the Potowomut Mill and mill privilege and the land and dwelling-house occupied as a part of said mill estate." The testator held a fee simple in the realty devised. It was held that H. W. G. took a fee simple, and not an estate for life. A devise of "all my estate" or of "my estate," will pass a fee, if the testator has it, whether the devise be general or with words of locality. Leland v. Adams, 9 Gray, 171; Arnold v. Lincoln, 8 R. I. 384; Beall v. Holmes, 6 H. & J. 205, 208; Chamberlain v. Owings, 30 Md. 447; Donovan v. Donovan, 4 Harring. (Del.) 177; Lambert v. Paine, 3 Cranch. 97; 2 Redfield on Wills, cap. 14, § 68, 13. So a devise of "my landed property," or of "all my landed property," will carry a fee. Fogg v. Clark, 1 N. H. 163; Foster v. Stewart, 18 Pa. St. 23. In Neide v. Neide, 4 Rawle, 75, the devise was, "my late purchase from E. C., and also four acres of woodland," in a designated locality, and the purchase from E, C. having been a fee, it was held that the devisee took a fee not only in the purchase, but also in the four acres of woodland. In Doe dem. Atkinson v. Fawcett, 3 C. B. 274, 283, a devise to B of "my moiety of the house he now lives in," was held to carry the fee. In Paris v. Miller, 5 M. & S. 408, a devise of "my share" in certain lands was held to carry a fee; and McClure v. Douthitt, 3 Pa. St. 446; reheard 6 Pa. St. 414, is to the same effect. These latter cases are not distinguishable from the case at bar. In Bebb v. Penoyre, 11 East, 160, the language was, "I give to my brother Samuel Castell my half part of the five freehold houses which I hold with him in Leadenhall street;" and Lord Ellenborough expressed the opinion that the devise carried the fee though he did not have to decide the point. In Montgomery v. Montgomery, 3 Jo. & Lat. 47, in the Irish Chancery, Sir Edward Sugden, as Chancellor, cited Lord Ellenborough's opinion with approval, and followed it. See also Hance v. West, 32 N. J. Law, 223; Purcell v. Wilson, 4 Gratt, 16.

We are glad to see a passenger who has, by the failure of a street car company to provide sufficient cars, been compelled to stand on the platform and thus receive an injury, bring an action against the company, and we are still better pleased to see the company compelled to pay damages. A defense such as that interposed in the case of *Thirteenth &c. R. Co. v. Boudrou*, decided by the Supreme Court of Pennsylvania recently is, to say the least, rather "cheeky." The plaintiff got upon a crowded street car, and stood with six or eight other passengers upon the rear platform. While there he was struck in the back and severely injured by the pole of a following car, by reason of the breaking of the brake chain of the last car. In an action for that injury the defendants asked the court to rule that the action of the plaintiff in standing on the platform was such contributory negligence as to bar his recovery. This the court refused and this ruling was affirmed on appeal. "The learned judge," said TRUNKEY, J., "taking a different and correct view, very properly charged that the plaintiff could not recover if the injury resulted from any negligence on his part; that if the jury should find that the plaintiff was negligent in standing on the rear platform, and yet find that the collision could not have happened but for the negligence of the driver of car fourteen, plaintiff's negligence was remote and not a bar to his recovery. His reasons given as leading to that conclusion are unanswerable. The large number of passengers in this city, who voluntarily stand on the platforms, because there is neither sitting nor standing room in the cars, do not, and ought not to anticipate that they will be run over by following cars. Their position has no tendency to induce the driving of one car into another, whatever the degree of their negligence in riding on the platforms, and the risks they take in so doing. Every one knows that so long as he remains there he is in no danger of being run down by a car, unless from its heedless handling. When the plaintiff was struck, his post was a condition, but not a cause of his injury. It neither lessened the speed of the car he was on, nor increased that of the other; his presence was not a cause of the broken chain and reckless driving of car fourteen; his place was an incident of an over-crowded car, whose conductor had left the platform to give him standing room, and had not pointed him to a seat or requested him to enter the car. We are not persuaded that different minds could honestly draw different conclusions from the facts."

RECENT LEGAL LITERATURE.

SCHOULER ON BAILMENTS.

This is a valuable work by an author already well known to the profession by his previous Treatise on the "Law of the Domestic Relations," etc. The important subject discussed in this volume is treated exhaustively. The text is full and clear, and the notes are evidently prepared with great care. It contains all the excellencies of its predecessor, Mr. Justice Story's great work upon the same subject, besides a faithful record of the growth of the law of Bailments since that work was written. Few branches of our jurisprudence have had a larger development within the past fifty years than the one treated in this volume. It was, therefore, high time for a new and more exhaustive discussion of the whole subject in the light of the more recent adjudications and with special reference to the modern law of Carriers. This task has been well performed by Mr. Schouler.

The work is divided into seven parts as follows: 1. Bailments in general. 2. Bailments for the bailor's sole benefit. 3. Bailments for the bailee's sole benefit. 4. Ordinary bailments for mutual benefit. 5. Exceptional mutual benefit bailments, postmasters and innkeepers. 6. Exceptional mutual benefit bailments, common carriers. 7. Carriers of passengers. The parts are divided into chapters, and the whole volume occupies 699 pages.

The author's discussion of the subject of Exceptional Mutual Benefit Bailments, with special reference to the duties and responsibilities of post masters, inn-keepers and common carriers, will be found especially interesting and valuable. Much space is devoted to a discussion of the law of Bailments in its relations to that of Common Carriers, and it is perhaps not too much to say that this feature of the work is of unequalled excellence.

A Treatise on the Law of Bailments, including carriers, inn-keepers and pledge. By James Schouler. Boston: Little, Brown & Co. 1880.

RECENT REPORTS.

The sixth volume of the Missouri Appeal Reports contains the cases decided from April 30, 1878, to March 5, 1879, many of them on topics of general professional interest among which we note the following: In *Orphan's Home Assn. v. Sharp* it is ruled that a gratuitous subscription to a charitable object can not be enforced, unless the promisee has done something in reliance upon it; the fact that others were thereby led to subscribe is not sufficient. Sureties on the bond of a book-keeper of a bank are discharged by his employment, without their consent, as teller. *Home Saving's Bank v. Trauhe*. A city ordinance that no horse or cattle dealer shall engage in such business without a license, which however is not to be granted without a certificate from the Board of Police Commissioners that the applicant is a person of good moral character, is not unreasonable. *City of St. Louis v. Knox*. A promise by the president of a bank to a depositor that if the latter will not check out his funds but permit them to remain in the bank, the former will pay the total deposit if the bank should close, is within the statute of frauds. *Walter v. Merrell*. An architect is not within the statute giving a lien to "every mechanic or other person" who performs work or labor on buildings, etc. *Raeder v. Bensberg*. The reporter's work is beyond criticism, and the publisher's leaves nothing to be desired. The volume contains 670 pages.

NOTES.

——The following is from California. Scene a police court. Judge—"Bill Sheets, you are charged with burglary. Are you guilty?" "Sure, yer 'onor, an' if it's gooilthy I am, do yez thinks I be afther tellin' yez ov it? I pleads not gooilthy," was the response of Bill. "All right," said the judge, and turning to one of the most eminent members of the bar, said: "You will please act as counsel for the defendant." At this the prisoner turned and calmly surveyed the placid countenance of his champion, and then addressed the court as follows: "Sure, an' if it's that yez afther givin' me fur a loiyer, I pleads gooilthy, and be done with it at once." Then as he turned and pointed to the robust form of a youthful member of the bar, he continued: "But if yoill give me him, as what is a foine loiyer, oill plade not gooilthy." The prisoner was allowed his choice of counsel.

——Lord Selborne, the Chancellor under the new English government, is sixty-eight years old. He was called to the bar in 1837, became a Q. C. in 1849, entered Parliament in 1852, and was appointed attorney-general in 1864. In 1868 he declined the chancellorship. In 1872, as Sir Roundell Palmer, he distinguished himself as counsel for the British government at the Geneva Arbitration, and was subsequently created a lord. He succeeded Lord Hatherly as Chancellor in 1873, retiring with Mr. Gladstone's ministry in 1874, when he was succeeded by Lord Cairns whom he now in turn displaces.——George A. Brayton formerly and for many years Chief Justice of the Supreme Court of Rhode Island, died on the 21st inst. aged seventy-seven.——Judge McCrary is to be tendered a reception by the Nebraska State Bar Association at Omaha, on the 5th prox.

——A good story, writes an Ohio subscriber from a prominent city in that State, is being related by members of the bar here, having for its principal characters two of our common pleas judges and the wealthy mayor of a suburban village. Judge X, who is a lover of good horse-flesh, invited Judge Y to take a ride with him behind his favorite steed. In the course of the drive they reached the above mentioned village. The avenues were broad, level and inviting and in spite of the fact that there is an ordinance restricting the rate of speed to five miles an hour, Judge X could not resist the temptation to give his horse a little spurt. But their enjoyment was short-lived. A police officer, came, saw and conquered. In vain they offered excuses and made known their official positions; it made no difference, they must go before the mayor. His Honor, the mayor, was on his dignity, unyielding, merciless. He said, "Gentlemen, I feel it my duty to establish a precedent by your cases, that those who are inclined to use our avenues for reckless driving may know the penalty. I fine you each ten dollars and costs." "Do I understand," inquired Judge X, that your honor fines Judge Y ten dollars and me ten dollars?" "I do," replied the mayor. "Well, Judge Y" said Judge X, "I grant you a *supersedeas* on writ of error in your case, and you may do the same in mine; we will take these cases up, your honor." And thereupon they took themselves up and off.

——Chief Justice Oliver Ellsworth was noted for his peculiarities, one of the most marked of which was his entire absorption in the welfare of his government. He made little account of table indulgences. His eating seemed to be regarded as a means of enabling him to continue his working and thinking; and the latter, indeed, was not often interfered with by his meals. When the table was ready and he had been summoned he generally came without delay, saying as he moved toward the table for the purpose of expediting matters: "Who eats? who eats?" He was devoid of ostentation and full of common sense. His father had given him a house and farm before he was married and about the time he began to practice law at the courts in Hartford. He was accustomed at that time to walk into the city during court time, and then to walk back in the evening, that he might attend to his cattle and his other home cares. One day, as he was walking into Hartford, he met an acquaintance of his, Mr. N., a man of wealth, riding in his own luxurious carriage. Said Mr. N, "Mr. Ellsworth, I am surprised to see a man like you going on foot, why don't you ride?" "I have observed," replied he, "that men generally have to walk some part of their lives, and I chose to do my walking while I am young and able to do it." This remark had the more significance when it came to be taken in connection with the fact that this same Mr. N afterwards lost his property and was obliged to do his walking in the feebleness of his advancing years; while Mr. Ellsworth, by his own talents and industry, had accumulated an ample fortune and traveled about in his own carriage. The Chief Justice was a man of commanding mien. When he was first presented to Napoleon, the emperor, after the interview, remarked to some one near him, "We shall have to make a treaty with that man; there is something uncommon in his looks."

Cases Determined in the St. Louis Court of Appeals of the State of Missouri. Reported by A. Moore Berry, official reporter. Vol. 6. St. Louis: F. H. Thomas & Co., 1880.